Filed 5/18/10 Colony Ins. Co. v. First Specialty Ins. Corp. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COLONY INSURANCE COMPANY, Defendant and Appellant, v. FIRST SPECIALTY INSURANCE CORPORATION et al., Plaintiffs and Respondents.	D055213 (Super. Ct. No. 37-2007-0078461-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

Colony Insurance Company (Colony) appeals a judgment for equitable contribution in favor of First Specialty Insurance Corporation (First Specialty) and StarNet Insurance Company (StarNet). First Specialty and StarNet sought contribution from Colony after they paid a settlement in a construction injury lawsuit on behalf of a general contractor, Eleven Western Builders (EWB), which was an additional insured

under a general liability policy Colony issued to EWB's subcontractor, Mechanical Industries, Inc. (Mechanical).

Colony contends the trial court erred in requiring it to contribute to the settlement because its policy did not provide coverage for the loss paid on behalf of EWB. Alternatively, Colony contends that even if the underlying loss were covered under its policy, the trial court nevertheless erred (1) in allocating the settlement payment among the First Specialty, StarNet and Colony policies; (2) in awarding prejudgment interest; and (3) in rejecting its offset claim for the payment First Specialty and StarNet received in a separate settlement of their subrogation claim against Mechanical. We conclude these contentions lack merit. Accordingly, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Underlying Accident and Lawsuit*

EWB was the general contractor on a project for the construction of an Albertson's supermarket in Downey, California. EWB subcontracted with Mechanical for structural steel work on the project, subject to a written agreement (the subcontract) that required Mechanical to (1) indemnify EWB for all damages arising in connection with that work, regardless of EWB's negligence; (2) name EWB as an additional insured under Mechanical's general liability insurance policy; and (3) comply with all federal, state, territorial and local codes and statutes. Among other work performed under the subcontract, Mechanical created openings in the supermarket's metal roof for skylights

and air conditioning equipment. Mechanical did not cover, mark or protect the roof openings.

Because the skylights had not yet arrived, EWB hired — on a time and materials basis — another subcontractor, RC Drywall (RCD), to cover the roof openings with plywood. EWB's foreman, an RCD supervisor and two RCD employees, including RCD construction worker Francisco Ortega, went to the roof of the building. EWB's foreman described what needed to be done, and another RCD employee translated the instructions for Ortega, who understood little English. Ortega's supervisors accompanied him to the roof on the morning he fell and explained to him how to do the work. Ortega used his own tools and was working alone when he fell through one of the many roof openings to a concrete floor approximately 23 feet below, suffering serious injuries.

Ortega filed a complaint against EWB and Mechanical seeking $26 million in damages (the Ortega lawsuit).[1] The complaint contained causes of action for negligence and negligence per se, alleging that EWB, Mechanical and unidentified "Doe" defendants, collectively, failed to protect Ortega from the danger of the unprotected roof openings they had created or permitted to be created, resulting in Ortega's injuries.

B. *EWB's Claims for Indemnity and Insurance Coverage*

EWB tendered its defense of the Ortega lawsuit to, and sought indemnity from, its general liability insurance carrier StarNet, and from insurance carriers First Specialty and

---

1 *Ortega v. Eleven Western Builders* (Super. Ct. Los Angeles County, 2005, No. VC044990).

Colony. First Specialty insured Ortega's employer RCD, and insured EWB under an additional insured endorsement contained in its policy. Colony issued subcontractor Mechanical a general liability policy (the Colony policy) that contained an additional insured endorsement insuring EWB under specified terms.

StarNet and First Specialty accepted EWB's tender of defense and agreed to indemnify the general contractor for the claims made in the Ortega lawsuit. Colony refused to defend or indemnify EWB.

Independently, EWB tendered its defense of the Ortega lawsuit to, and sought indemnity from, subcontractor Mechanical, under the express indemnity provision contained in the subcontract. As had its insurer Colony, Mechanical refused to defend or indemnify EWB.

The Ortega lawsuit settled for a $1,050,000 payment to Ortega (the Ortega settlement), of which First Specialty paid $1 million (its policy limits) and StarNet paid $50,000.

C. *Filing of This Action for Subrogation and Equitable Contribution*

After the Ortega lawsuit settled, First Specialty and StarNet filed this action seeking to recover the money paid in the defense of, and the settlement on behalf of, EWB in the Ortega lawsuit. The complaint contained a cause of action against Mechanical for subrogation and a cause of action against Colony for equitable contribution. The complaint asserted additional causes of action for declaratory relief against Mechanical and Colony.

Before trial, Mechanical offered to settle with First Specialty and StarNet under Code of Civil Procedure section 998 (section 998 offer) for a payment of $151,000 in exchange for a dismissal with prejudice and general release of all claims against it. First Specialty and StarNet accepted Mechanical's section 998 offer. The parties stipulated that Mechanical's payment resolved all claims for reimbursement of defense costs related to the Ortega lawsuit, "leaving a balance of $122,144.85 attributed to indemnity."

After the settlement with Mechanical, only First Specialty and StarNet's causes of action against Colony for equitable contribution and declaratory relief remained to be tried. The parties stipulated to a bench trial, to be based on the evidence previously submitted on cross-motions for summary judgment, which had been denied, plus the insurance policies issued by First Specialty and StarNet.

D. *The Trial Court's Ruling*

The trial court issued a written statement of decision under Code of Civil Procedure section 632, resolving the parties' remaining claims. In the statement, the trial court found Ortega was injured when he fell through one of the roof openings Mechanical had created under its subcontract with EWB. Because the subcontract required Mechanical to comply with applicable codes and statutes, including the California regulations specifically requiring roof openings to be protected, the trial court concluded that Mechanical was "contractually obligated and owed a duty to protect the roof openings."

Analyzing the Ortega lawsuit complaint, the trial court found there were several claims made against EWB for which it could be held indirectly liable and that such claims were potentially covered under the Colony policy's additional insured endorsement. In particular, the Ortega lawsuit alleged that (1) EWB and Mechanical were agents of each other and acted within the scope of such agency; (2) EWB "carelessly and negligently supervised, . . . selected, hired, engaged and permitted others to work on the construction site resulting in the creation of a danger[ous], defective and unsafe condition — an unprotected roof opening"; and (3) EWB and Mechanical failed to protect the roof openings and to protect Ortega against falling. Given the potentially covered claims, the trial court determined Colony had a duty to defend EWB in the Ortega lawsuit.

The trial court rejected Colony's argument that its policy did not provide coverage to EWB under the exclusion for "'bodily injury or property damage directly arising out of or resulting from the negligence of the additional insured[s]'" because it found that the exclusion did not unambiguously exclude "a situation . . . where both the named insured and the additional insured are alleged or found to be negligent." The trial court reasoned that Colony had a duty both to defend and to indemnify EWB because "Ortega's claims are based on both EWB['s] and Mechanical's negligence."

Applying the other insurance provisions contained in the StarNet, First Specialty and Colony policies, the trial court ruled that Colony was required to contribute 50 percent of the $1,050,000 settlement paid on behalf of EWB by First Specialty and

StarNet, and entered judgment against Colony in the principal sum of $525,000, plus prejudgment interest of $125,716.16, for a total judgment of $650,716.16. The trial court rejected Colony's argument that it should receive an offset for the amount First Specialty and StarNet received in settlement from Mechanical, ruling that to allow an offset would be contrary to the separate nature of the claims asserted against Colony and Mechanical.

II

DISCUSSION

Equitable contribution is available to apportion a loss among several insurers when each of those insurers is "'"obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others." . . . "The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others."'" (*Safeco Ins. Co. of America v. Superior Court* (2006) 140 Cal.App.4th 874, 879 (*Safeco*), quoting *Maryland Casualty Co. v. Nationwide Mutual Ins. Co.* (2000) 81 Cal.App.4th 1082, 1089.)

When a trial court is called upon to evaluate claims for equitable contribution among multiple liability insurers, each insuring the same insured on the same claim, the trial court exercises its discretion and weighs the equities seeking to attain distributive justice and equity among the mutually liable insurers. (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1293.) The court may consider numerous factors in making its determination, including the nature of the underlying

claim, the relationship of the insured to the various insurers, the particulars of each policy, and any other equitable considerations. (*Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 974.)

A. *Standard of Review*

Varying standards of review apply to the different inquiries presented by the appeal of this equitable contribution judgment against Colony.

We review the interpretation of the Colony policy de novo because there was no extrinsic evidence presented at trial, and thus no factual dispute, as to its meaning. (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 818.)

To the extent that application of the Colony policy language involves disputed facts or inferences to be drawn from undisputed facts, we review the trial court's findings for substantial evidence. "We begin with the presumption that the record contains evidence to uphold every finding of fact and appellant has the burden to demonstrate there is no substantial evidence to support the findings under attack. [Citation.] '"When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." [Citations.]'" (*North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 285 (*North American Capacity Ins. Co.*), citing *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

We also review the trial court's implied factual findings for substantial evidence. "Under the doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision. . . . The appellant also must bring ambiguities and omissions in the factual findings of the statement of decision to the trial court's attention. If the appellant fails to do so, the reviewing court will infer the trial court made every implied factual finding necessary to uphold its decision, even on issues not addressed in the statement of decision. The question then becomes whether substantial evidence supports the implied factual findings." (*Fladeboe v. American Isuzu Motors Inc*. (2007) 150 Cal.App.4th 42, 48 (*Fladeboe*).) In this case, as Colony "'did not raise any objections to the statement of decision[, we] are required to presume the trial court made all findings necessary to support the judgment.'" (*Id*. at p. 60, quoting *Sammis v. Stafford* (1996) 48 Cal.App.4th 1935, 1942.)

We review the trial court's ultimate equitable determination in allocating liability among the responsible insurers for abuse of discretion. (*Scottsdale Ins. Co. v. Century Surety Co.* (2010) 182 Cal.App.4th 1023, 1033 (*Scottsdale Ins. Co.*); *Hartford Casualty Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710, 724.) An abuse of discretion occurs when, in light of applicable law and considering all relevant circumstances, the court's ruling exceeds the bounds of reason. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479 (*Shamblin*); *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

B. *Colony's Coverage Issues*

Colony contests its obligation to contribute to the Ortega settlement on behalf of EWB, arguing: (1) because Ortega was a special employee of EWB entitled only to workers' compensation benefits for his injuries, the Ortega settlement was either a voluntary payment or a payment of workers' compensation benefits not covered under the Colony policy; and (2) even if Ortega were not EWB's special employee, the Colony policy barred coverage for injuries arising directly out of EWB's negligence and the evidence shows that "EWB's direct negligence [was] a cause, if not the only cause, of Mr. Ortega's accident." We review each of these contentions in turn.

1. Colony Did Not Establish That Ortega was EWB's Special Employee

The trial court found Colony failed to establish that Ortega was Mechanical's special employee whose sole remedy against EWB was workers' compensation benefits. The trial court's finding is supported by substantial evidence. Ergo, we reject Colony's appellate contention that the Ortega settlement was either a voluntary payment or a payment of workers' compensation benefits not covered by the Colony policy.[2]

---

[2] Colony relies on the exclusion in its policy excluding coverage for "[a]ny obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law." In addition, because a special employee's sole remedy for work-related injury is workers' compensation (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174-175 (*Kowalski*)), Colony appears to argue that no insurer was required to defend or indemnify the Ortega lawsuit, and that therefore the Ortega settlement was a voluntary payment, which Colony argues is not covered by its policy. Although Colony fails to cite any particular policy language excluding such voluntary payments, we need not address the validity of its argument because we conclude Colony failed to show that Ortega was EWB's special employee.

a. *Applicable law*

"'Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers — his original or "general" employer and a second, the "special" employer.'" (*Kowalski*, *supra*, 23 Cal.3d at pp. 174-175.) "'The special employment relationship and its consequent imposition of liability upon the special employer flows from *the borrower's power to supervise the details of the employee's work.* Mere instruction by the borrower on the result to be achieved will not suffice.'" (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 216-217 (*Brassinga*), quoting *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 (*Marsh*); *Kowalski*, at pp. 176-178.)

In addition to the alleged special employer's control over the employee, there are a number of other factors relevant to deciding whether a special employment relationship exists between an employee and the borrower. The existence of a special employment relationship may be supported by evidence that (1) the alleged special employer paid wages to the employee, (2) the alleged special employer had the power to discharge the employee, (3) the work performed by the employee was unskilled, (4) the work tools were provided by the alleged special employer, (5) the work was part of the alleged special employer's regular business, (6) the employee expressly or impliedly consented to a special employment relationship, (7) the parties believed they were creating a special employment relationship, and (8) the alleged special employment period was lengthy.

(*Kowalski, supra,* 23 Cal.3d at p. 177.) A special employment relationship may be negated by evidence that "[t]he employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer." (*Marsh, supra,* 26 Cal.3d at p. 492, citing *Kowalski,* at pp. 176-177.)

The issue of special employment is a question of fact where "'*the evidence, though not in conflict, permits conflicting inferences.*'" (*Brassinga, supra,* 66 Cal.App.4th at p. 210, italics added, quoting *Marsh, supra,* 26 Cal.3d at p. 493.) Such is the case here. We therefore apply the substantial evidence standard of review to the trial court's determination that Ortega was not a special employee of EWB. Colony has the burden to demonstrate there is no substantial evidence to support the findings under attack. (*North American Capacity Ins. Co., supra,* 177 Cal.App.4th at p. 285.)

b. *The trial court's finding that Colony failed to show Ortega was EWB's special employee is supported by substantial evidence*

Colony contends the trial court erred in its application of the law to the facts regarding Ortega's relationship to EWB.[3] Colony contends it established that Ortega was

---

[3] Although it is not entirely clear, Colony appears to argue that the trial court erred in denying its motion for summary judgment on this issue because Colony introduced sufficient evidence to show Ortega was EWB's special employee. We decline to review the trial court's denial of Colony's motion for summary judgment, which was based on the ground that Colony "fail[ed] to establish the absence of triable issues of material fact" as to whether Ortega was EWB's special employee. "[O]rders denying summary judgment based on triable issues of fact are not reviewable as a matter of law after a full trial

"essentially 'borrowed'" from his employer RCD and became the special employee of EWB because EWB controlled the work to be performed by Ortega. We reject the argument.

The evidence submitted to the trial court showed that Ortega was employed by RCD and that EWB hired RCD to perform the task of covering the roof openings. EWB's foreman instructed one of Ortega's supervisors, an employee of RCD, on what needed to be done, and another RCD employee translated the instructions for Ortega, who understood little English. Ortega's supervisors accompanied him to the roof on the morning he fell and explained to him how to do the work. Ortega was alone on the roof while he worked.

"'Mere instruction by the borrower on the result to be achieved [does] not suffice . . .'" to show special employer status, in the absence of a showing that EWB retained the "'power to supervise the details of the employee's work.'" (*Brassinga*, *supra*, 66 Cal.App.4th at pp. 216-217, italics omitted.) Here, the fact that RCD's supervisors and translator delivered the instructions to Ortega shows that EWB was not sharing control of, or supervising, "'the details of [Ortega's] work.'" (*Ibid*., italics omitted.)

---

covering the same issues." (*California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682, 688.) Here, Colony stipulated to a bench trial based on the same evidence it presented on its motion for summary judgment, and received a full trial on this issue, which was decided against it.

Nothing in the evidence showed EWB retained power to supervise Ortega's performance of the details of the task.

Moreover, it was not disputed that (1) EWB contracted with and would pay Ortega's general employer, RCD, on a time and materials basis, to perform the work and therefore did not pay Ortega directly for the work; (2) although EWB supplied materials (plywood and screws), the work tools were provided by RCD and/or Ortega himself, not EWB; and (3) the alleged period of employment was not lengthy (one day). No showing was made that it was EWB's regular business to cover roof openings or that EWB had the power to discharge Ortega. It is doubtful Ortega consented to a "special employment relationship," because the evidence showed that EWB's foreman communicated directly only with Ortega's supervisor.

Attempting to demonstrate that EWB had control over Ortega, Colony points to the citations issued by the California Department of Industrial Relations, Division of Occupational Safety and Health (CalOSHA) to EWB, as the "controlling employer," for the purposes of enforcing CalOSHA regulations relating to the protection of roof openings and fall control equipment. Those regulations define "controlling employer" as "[t]he employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer) . . . ." (Cal. Code Regs., tit. 8, § 336.10.) The regulations do not address whether the "controlling employer" has control over the details of an employee's work, as would be required to

find the employee a special employee in the workers' compensation context. Therefore, we conclude that the CalOSHA citation of EWB as the "controlling employer" at the construction site is not dispositive.

In sum, substantial evidence supports the trial court's finding that Ortega was not EWB's special employee. We therefore conclude that the Ortega settlement was not a voluntary payment or a payment of workers' compensation benefits excluded under the Colony policy (see fn. 2, *ante*).

2. The Colony Policy Provides Coverage to EWB for the Claims Made in the Ortega Lawsuit

We next consider Colony's contention that it has no obligation to contribute to the Ortega settlement because the Colony policy's additional insured endorsement did not cover EWB for the claims made against it in the Ortega lawsuit. Relying on the endorsement's language insuring only "indirect liability," and its exclusion for bodily injury "directly arising out of or resulting from the negligence of the 'additional insured(s),'" Colony contends the endorsement provides coverage to EWB only where EWB faces a claim based *solely* on its indirect liability caused by or resulting from Mechanical's ongoing operations. The liability faced by EWB in the Ortega lawsuit, Colony contends, was "direct liability" based on its own conduct in "sending Mr. Ortega into harm's way." We examine these contentions after reviewing the relevant policy language and applicable principles of insurance policy interpretation.

a. *The Colony policy*

In the Colony policy's insuring clause, Colony agrees to pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Colony's additional insured endorsement adding EWB to Mechanical's policy defines EWB as an "'insured,'" "but only: [¶] . . . with respect to *indirect liability* caused by or resulting from [Mechanical's] ongoing operations performed for [EWB.]" (Italics added.) An exclusion contained within the endorsement provides:

> "This insurance does not apply to: [¶] . . . [¶] **Negligence of Additional Insured:** 'Bodily injury' or 'property damage' directly arising out of or resulting from the negligence of the 'additional insured(s)'."

b. *Applicable principles of insurance policy interpretation*

Applying a de novo standard of review, we determine the meaning of the Colony policy by applying the ordinary rules of contractual interpretation, including the fundamental objective of giving effect to the mutual intention of the parties. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 (*Bank of the West*); see Civ. Code, § 1636.) Where the policy language is clear and explicit, it will govern. (*Bank of the West*, at pp. 1264-1265.) If the policy language is ambiguous we must look to "'the objectively reasonable expectations of the insured.'" (*Id*. at p. 1265, quoting *AIU Ins. Co. v. Superior Court*, *supra*, 51 Cal.3d at p. 822.) If the ambiguity cannot be resolved by reference to the insured's expectations, we must then construe coverage provisions broadly and in favor of coverage, and exclusions or limitations narrowly, against the

insurer. (*Bank of the West*, at p. 1265; see also *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 101-102 (*Partridge*); *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 269 & fn. 3 (*Gray*).)

Insurers have the burden of proving that a policy exclusion applies to a claim without ambiguity. (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1022; *North American Capacity Ins. Co.*, *supra*, 177 Cal.App.4th at pp. 284-285.) The insurer seeking to show that an exclusion applies therefore also bears the burden of proving every fact essential to show the absence of coverage. (Evid. Code, § 500; *Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1453 [applying principle that burden of proving the fact essential to a claim of nonliability rests with the insurer].)

c. *Analysis*

The starting point for analysis of an equitable contribution claim is to determine whether the noncontributing insurer had a duty to defend. (*Safeco, supra,* 140 Cal.App.4th at pp. 879-880.)[4] "[I]n an action for equitable contribution by a settling

---

4 We disagree with Colony's contention that the trial court "unnecessar[il]y" focused on its duty to defend the Ortega lawsuit and "failed to distinguish between the legal and related analytic differences between the question of Colony's duty to defend versus its duty to indemnify." In fact, the trial court's analysis did differentiate between the potential coverage under the Colony policy for the Ortega lawsuit, giving rise to the duty to defend, and the subsequent failure of Colony to show that its policy excluded coverage of EWB for the claims made in the Ortega settlement. The trial court thus correctly, if not explicitly, engaged in the two-step process set forth in *Safeco, supra,* 140 Cal.App.4th at pages 879-880.

insurer against a nonparticipating insurer, the settling insurer has met its burden of proof when it makes a prima facie showing of coverage under the nonparticipating insurer's policy — the same showing necessary to trigger the recalcitrant insurer's duty to defend — and . . . the burden of proof then shifts to the nonparticipating insurer to prove the absence of actual coverage." (*Safeco, supra*, 140 Cal.App.4th at p. 881.) We therefore first examine whether Colony had a duty to defend EWB in the Ortega lawsuit. We then review Colony's contentions that the Colony policy provided no actual coverage for EWB's liability in the Ortega lawsuit and that Colony should not have been equitably required to contribute to the Ortega settlement.

i. Colony was required to defend EWB in the Ortega lawsuit because the Colony policy does not clearly exclude coverage for claims against an additional insured for which it could have both direct and indirect liability

A liability insurer's duty to defend is broader than its duty to indemnify and runs to claims that are merely potentially covered under the allegations of the complaint. (*Safeco, supra*, 140 Cal.App.4th at p. 879, fn. 2, citing *Buss v. Superior Court* (1997) 16 Cal.4th 35, 46 (*Buss*); *Gray, supra*, 65 Cal.2d at pp. 276-277.) In a "'mixed' action," in which some of the claims are at least potentially covered and the others are not, the insurer has a duty to defend the entire action. (*Buss*, at pp. 47-49.) To determine whether Colony had a duty to defend EWB in the Ortega lawsuit, we look to the policy language, the allegations of the complaint and other facts known to the insurer, in order to

determine if any allegations potentially fall within the coverage afforded by the Colony policy. (*Gray*, at pp. 276-277.)

Colony's additional insured endorsement provides coverage to EWB "with respect to *indirect liability* caused by or resulting from [Mechanical's] ongoing operations performed for [EWB.]" (Italics added.) The plain language of the endorsement thus encompasses any form of "indirect liability caused by or resulting from [Mechanical's] ongoing operations," which would include liability imputed to EWB under the doctrine of respondeat superior (see, e.g., *Hinman v. Westinghouse Elec. Co*. (1970) 2 Cal.3d 956, 960), or vicarious liability based on the principle that a general contractor has a nondelegable duty to protect against dangerous conditions. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727 (*Srithong*) [liability based on a "nondelegable duty" is a form of vicarious liability].)

The Ortega lawsuit asserted claims against EWB for which it could be held vicariously or indirectly liable. Specifically, the complaint alleged each defendant (1) was liable for Ortega's injuries based on the other defendants' actions within the scope of their agency and employment by each other; (2) "carelessly and negligently supervised, performed work and selected, hired, engaged and permitted others to perform work on the construction site resulting in the creation of a dangerous, defective and unsafe condition — an unprotected roof opening";[5] (3) failed to protect the roof openings

---

5 Colony aptly points out that negligent hiring and failure to supervise are theories of direct negligence. (E.g., *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th

with covers, railings, toeboards and warnings; and (4) "had the opportunity to make the property safe, but failed to take appropriate measures to correct and/or warn of the condition and/or avoid the condition causing [Ortega's] injuries." EWB thus faced indirect liability in the Ortega lawsuit, for which it was potentially covered under the Colony policy.

Colony contends that its additional insured endorsement forecloses even the possibility of coverage for EWB's liability in the Ortega lawsuit, relying chiefly on the language of the exclusion contained within the body of the endorsement for "'[b]odily injury' . . . directly arising out of or resulting from [EWB's] negligence . . . ." We disagree. Although the exclusion may bar claims for injuries that arise *solely* (and directly) from EWB's negligence, the exclusion does not address, much less exclude, coverage for claims for bodily injuries where it is alleged *both* that EWB was negligent and that EWB was liable for others' negligence. In the context of this claim, the exclusion is at best unclear. "[T]o be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.'"

790, 811-812, 815 ["the liability for negligent supervision or retention of an employee is one of direct liability for negligence, not vicarious liability"].) However, in the Ortega complaint, the allegations of negligent hiring and failure to supervise are not set forth as separate causes of action or as the only theories underlying Ortega's negligence causes of action. Notably, the complaint also alleges EWB permitted a dangerous condition to exist at the project and that Mechanical (and others) had negligently performed work, causing Ortega's injuries. The complaint thus asserted that EWB was liable for its own actions as well as for the actions of others, and constituted a "'mixed' action," containing both potentially covered and uncovered claims. (*Buss*, *supra*, 16 Cal.4th at pp. 47-49.)

(*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204.) Here, a reasonable additional insured would expect at least some coverage for a claim for bodily injuries in which its purported liability was not based solely on its own negligence. Thus, the Colony policy exclusion is unenforceable and Colony was obligated to defend EWB in the Ortega lawsuit.

We therefore conclude that (1) the Ortega lawsuit's claims against EWB potentially fell within the scope of coverage afforded to EWB by Colony's additional insured endorsement and triggered Colony's duty to defend; (2) the Colony policy did not clearly exclude all coverage for the claims made against EWB in the Ortega lawsuit; and (3) because Colony refused to defend or indemnify EWB with respect to the Ortega lawsuit, Colony had the burden to demonstrate the absence of actual coverage for EWB's liability resolved by the Ortega settlement. (*Safeco, supra,* 140 Cal.App.4th at p. 881 [upon prima facie showing of coverage under its policy, "the burden of proof then shifts to the nonparticipating insurer to prove the absence of actual coverage"].) We next examine whether Colony met that burden.

ii. Colony fails to demonstrate there was no actual coverage under its policy for EWB's liability resolved by the Ortega settlement

Attempting to show the absence of actual coverage for EWB's liability resolved by the Ortega settlement, Colony contends the exclusion contained within its additional insured endorsement barred coverage because the evidence shows that "EWB's direct negligence [was] a cause, if not the only cause, of Mr. Ortega's accident." We disagree.

Not only did the Colony policy not exclude coverage for a mixed claim against an additional insured, but, as the trial court implicitly found, both EWB's and Mechanical's negligence proximately caused Ortega's injuries.

"[L]iability coverage exists 'whenever an insured risk constitutes a proximate cause of an accident, even if an excluded risk is a concurrent proximate cause.'" (*State of California v. Allstate Ins. Co.*, *supra*, 45 Cal.4th at p. 1029, quoting *Partridge*, *supra*, 10 Cal.3d at p. 105, fn. 11.) A defendant's conduct is a proximate cause (or "cause in fact") of an injury if it is a "substantial factor" in bringing about the harm. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 969 (*Rutherford*), citing Rest.2d Torts, § 431, subd. (a), p. 428; *Wilson v. Blue Cross of So. California* (1990) 222 Cal.App.3d 660, 672.) In determining coverage in the context of concurrent proximate causes, one covered and one excluded, "we look to whether a covered act or event subjected the insured to liability for the disputed property damage or injury under the law of torts. We ask, in the standard insuring language used [in general liability policies], whether the disputed amounts are 'sums which the Insured . . . [became] obligated to pay . . . for damages . . . because of' . . . damage that is not excluded under the policy. [Citation.] If the insured's nonexcluded negligence 'suffices, in itself, to render him fully liable for the resulting injuries[,]' . . . [citation] the insurer is obligated to indemnify the policyholder even if other, excluded causes contributed to the injury . . . ." (*State of California v. Allstate Ins. Co.*, *supra*, at p. 1031, citing *Partridge*, *supra*, 10 Cal.3d at pp. 99, fn. 5, 103.)

As we have explained, the trial court ruled that coverage existed under the Colony policy because Ortega's claims against EWB were based on "both EWB['s] and Mechanical's negligence." The trial court's ruling is supported by its implied findings that (a) the negligence of both Mechanical and EWB caused Ortega's injury, and (b) fault for Ortega's injury was indivisible as between EWB and Mechanical.[6]

We conclude substantial evidence supports the finding that Ortega's injuries were caused by both Mechanical's and EWB's negligence. Colony concedes, as it must, that Mechanical's negligence was a contributing cause of Ortega's injury. Mechanical failed to protect the holes it cut in the supermarket's metal roof — protection that the court observed was required under California law as well as under Mechanical's subcontract. (Cal. Code Regs., tit. 8, § 1632.) Although the trial record also contains evidence establishing that EWB negligently caused Ortega's injuries, the evidence indicates EWB was not *solely* or directly responsible for Ortega's injury, and that a covered cause — Mechanical's negligence —was a substantial factor in, and proximate cause of, the accident. (*Rutherford*, *supra*, 16 Cal.4th at p. 969; see, e.g., *Morgan v. Stubblefield* (1972) 6 Cal.3d 606, 627 [negligent creation of an uncovered hole on construction site

---

6 The trial court did not make such findings explicitly, but Colony never requested clarification of the trial court's decision or objected to the statement of decision on the ground that it did not include a specific finding on whose negligence caused Ortega's injuries or whether the fault was divisible. We therefore imply such findings and review them under the substantial evidence standard. (*Fladeboe*, *supra*, 150 Cal.App.4th at p. 60; *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140 [under Code Civ. Proc., § 634, a party must raise an objection to the statement of decision to "in order to avoid an implied finding on appeal in favor of the prevailing party"].)

was a proximate cause of injuries to workers injured when their scaffolding fell in hole].)[7]

Substantial evidence also supports the trial court's implied finding that fault for Ortega's injuries was indivisible. The evidence shows Ortega's injuries were caused by his fall; however, because the Ortega lawsuit was settled before trial, there was never a judicial determination of the parties' relative degrees of fault for Ortega's injuries. (See, e.g., *McCrary Construction Co. v. Metal Deck Specialists, Inc*. (2005) 133 Cal.App.4th 1528, 1532 [in case involving facts similar to Ortega lawsuit, jury apportioned fault 45 percent to general contractor, 30 percent to the subcontractor, and 25 percent to the victim].) Moreover, in this action, Colony introduced no evidence supporting an apportionment of fault for Ortega's injuries as between EWB and others, as it might have done to carry its burden to show what part of the settlement was not covered by its policy.[8] (See, e.g., *North American Capacity Ins. Co.*, *supra*, 177 Cal.App.4th at p. 294 [expert opinion regarding relative percentages of responsibility of subcontractors on

---

[7] Although proximate cause is frequently a factual issue, it becomes a legal issue where only one inference can be reasonably drawn from the uncontroverted facts. (*Sanders v. Atchison, Topeka & Santa Fe Ry. Co.* (1977) 65 Cal.App.3d 630, 649.) On appeal, Colony asserts the trial court's ruling was based upon facts that were not disputed, and it does not contest the trial court's findings that Mechanical was contractually obligated to cover the holes or that Mechanical's negligence caused the Ortega accident, at least in part.

[8] Asserting that "there was an undetermined portion of EWB's liability" that was based on EWB's own negligent conduct, Colony tacitly concedes in its opening brief on appeal that no apportionment was supported by the evidence at trial.

defective construction claim, used by trial court to allocate responsibility to subcontractors' insurers in equitable contribution claim].)

Given the trial court's factual findings, a covered, proximate cause — Mechanical's negligence — rendered EWB fully liable for Ortega's injury. (*Srithong*, *supra*, 23 Cal.App.4th at p. 728 [entity vicariously liable under nondelegable duty rule is jointly and severally liable notwithstanding Prop. 51's modification of common law joint and several liability].) The Colony policy provides coverage to EWB as an additional insured for "those sums" that EWB was "legally obligated to pay" for a covered injury. Here, EWB could have been held "legally obligated to pay" all of the damages in the Ortega lawsuit, and Colony was "obligated to indemnify [EWB] even if other, excluded causes contributed to" Ortega's injuries. (*State of California v. Allstate Ins. Co.*, *supra*, 45 Cal.4th at p. 1031.)

Having determined that Colony was obligated to indemnify EWB,[9] we next turn to Colony's claim that the trial court abused its discretion in determining the amount Colony was obligated to contribute to the Ortega settlement.

---

9 Colony cursorily argues that its policy only covered liability caused by or resulting from Mechanical's "ongoing operations" (italics omitted), and that since it had already cut the roof openings before Ortega fell, the Ortega lawsuit did not result from its ongoing operations. However, Colony cites no legal authority to support its argument, fails to develop any argument based on the policy's more detailed provisions regarding ongoing operations, and cites no evidence showing that Mechanical had ceased operations at the jobsite. "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) We therefore consider this argument abandoned. (*Huntington Landmark Adult Community Assn. v. Ross* (1989) 213 Cal.App.3d 1012, 1021.)

C. *Application of Other Insurance Clauses*

Colony challenges the trial court's allocation of the Ortega settlement between itself and First Specialty, rather than among the three insurance carriers whose policies provided coverage for the Ortega lawsuit, arguing that the court erred in utilizing the policies' other insurance provisions to deem the StarNet policy excess to the other two policies. We disagree. As we will explain, the trial court did not abuse its discretion in allocating the Ortega settlement between First Specialty and Colony according to the other insurance clauses contained in the three carriers' policies.[10] Before addressing Colony's contentions, we first review the applicable law and the trial court's application of the policies' other insurance clauses.

1. Applicable Law

Other insurance clauses are policy provisions that attempt to limit an insurer's liability to the extent that other insurance covers the same loss. "'"[T]he application of 'other insurance' clauses requires, as a foundational element, that there exist multiple policies applicable to the *same loss*."'" (*Fireman's Fund Ins. Co. v. Maryland Casualty Co., supra*, 65 Cal.App.4th at p. 1304.)

---

10 Because our rejection of Colony's arguments disposes of the issue, we need not reach First Specialty and StarNet's contention that the issue should be resolved by reference to the "Type I" indemnity provision contained in EWB's subcontract with Mechanical. (Citing *Rossmoor Sanitation Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 634-635.) As First Specialty and StarNet recognize, the trial court reached the same result under the policies' other insurance clauses that they urge us to reach under *Rossmoor*.

There are generally three types of "other insurance" clauses. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶¶ 8:15 to 8:20, pp. 8-5 to 8-8.) Under a "[p]ro rata" other insurance clause, the insurer seeks to limit its liability to "the proportion that its policy limits bear to the total coverage available to the insured." (*Id.*, ¶ 8:16, p. 8-6.) Under an "[e]xcess only" other insurance clause, "[i]f there is other valid and *collectible* insurance, the insurer is liable only to the extent the loss exceeds such other insurance." (*Id.*, ¶ 8:19, p. 8-7; *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, *supra*, 65 Cal.App.4th at p. 1305.) Under an "[e]scape" other insurance clause, the "existence of other valid and collectible insurance *extinguishes* the insurer's liability to the extent of such other insurance." (Croskey, *supra*, ¶ 8:20, p. 8-8.)

The courts will "'generally honor the language of excess "other insurance" clauses when no prejudice to the interests of the insured will ensue.'" (*Hartford Casualty Ins. Co. v. Travelers Indemnity Co.*, *supra*, 110 Cal.App.4th at p. 725, quoting *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, *supra*, 65 Cal.App.4th at p. 1304.) However, where two or more insurers' clauses covering a loss are mutually repugnant (i.e., they constitute "escape clauses" with respect to each other), courts typically do not enforce the clauses but prorate the loss among the insurers. (*Hartford Casualty Ins. Co. v. Travelers Indemnity Co.*, *supra*, at p. 725, quoting *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, *supra*, at pp. 1304-1305; *Century Surety Co. v. United Pacific Ins. Co.* (2003) 109 Cal.App.4th 1246, 1260; *Travelers Casualty & Surety Co. v. Century Surety Co*. (2004) 118 Cal.App.4th 1156, 1162.)

2. The Trial Court's Allocation of the Ortega Settlement by Application of the Other Insurance Clauses

After determining that the Colony policy covered EWB for the payment made on its behalf in the Ortega settlement, the trial court determined it would allocate the Ortega settlement among the coinsurers "'in direct ratio'" to the proportionate share each insurer's coverage bore to the total primary insurance coverage provided by all applicable polices. In order to determine which policies were applicable, the court looked to the policies' "other insurance" clauses.

The "other insurance" clauses contained in Colony, First Specialty and StarNet's policies were identical[11] and provided, in pertinent part, that where there was "other valid and collectible insurance . . . available . . . for a [covered] loss," each policy would apply as primary insurance unless there were "[a]ny other primary insurance available to [EWB] covering liability for damages arising out of the premises or operations for which [EWB has] been added as an additional insured by attachment of an endorsement," in which case the policy would be excess. The policies thus provide that the three insurers would jointly cover a loss *unless*, as here, another policy or policies provided coverage under an additional insured endorsement. In such a situation, the policy would be deemed excess to the other policies. The excess carrier would pay only that share of the

11 Colony is mistaken in asserting that the First Specialty and StarNet policies do not contain the same "other insurance" language. The clauses are identical.

loss that exceeded the amount that all other primary insurers would pay for the loss and any deductibles or self-insured amounts.

Applying this clause, the trial court found that the StarNet policy was excess to the policies issued by Colony and First Specialty, which covered EWB "as an additional insured by attachment of an endorsement" as specified in the other insurance clause. By contrast, EWB was the named insured on the StarNet policy, so that the Colony and First Specialty policies remained primary relative to the StarNet policy. Noting that the other insurance provisions did not conflict with each other, offend public policy or infringe on the rights of the insured, the trial court found "the equities require enforcement of the other insurance clause in the StarNet policy."

Having determined the StarNet policy was excess, the trial court allocated the settlement first to the primary policies of Colony and First Specialty, which each bore a $1 million limit. The trial court held First Specialty and StarNet (who jointly paid the $1,050,000 settlement) were entitled to equitable contribution from Colony for half of the settlement amount ($525,000), because after applying the other insurance clauses to make StarNet's coverage excess, the Colony policy limits represented half of the total limit available to pay the claim.

3. The Trial Court Did Not Abuse Its Discretion in Applying the Other Insurance Clauses to Allocate the Ortega Settlement Between First Specialty and Colony

Colony challenges the trial court's determination that the StarNet policy was excess to the Colony and First Specialty policies, asserting that the trial court should have

ignored the other insurance clauses and allocated the Ortega settlement pro rata among all three carriers who provided coverage to EWB. We disagree. The method of allocation was a matter within the trial court's discretion, and Colony fails to show the trial court abused its discretion.

A court's decision allocating the amount that a nonparticipating carrier will be equitably required to contribute to a settlement is a matter within its equitable judicial discretion, subject to review for abuse of discretion. (*Scottsdale Ins. Co.*, *supra*, 182 Cal.App.4th at p. 1033.) This standard of review also applies where the court applies the other insurance clauses of the coinsurers' policies to determine the allocation of a settlement payment. (*Hartford Casualty Ins. Co. v. Travelers Indemnity Co.*, *supra*, 110 Cal.App.4th at pp. 724-725 [holding trial court did not abuse its discretion in refusing to order contribution by an insurer where the terms of the other insurance clauses provided its policy would be excess to that of the other insurer].) In general, to allocate indemnity costs between or among coinsurers, courts consider the "varying equitable considerations which may arise . . . which depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers." (*Signal Companies, Inc. v. Harbor Ins. Co*. (1980) 27 Cal.3d 359, 369; *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, *supra*, 65 Cal.App.4th at pp. 1306-1307.)

Here, the trial court chose to follow the identical other insurance clauses contained in each of the three carriers' policies in order to establish the priority of coverage for the Ortega settlement. Colony's coverage for EWB, like that of First Specialty, was "primary

insurance available to [EWB] covering liability for damages arising out of the premises or operations for which [EWB has] been added as an additional insured by attachment of an endorsement," within the meaning of the other insurance clauses. Although the StarNet policy also provided indemnity to EWB for the amounts paid in the Ortega settlement, because it was not insurance "for which [EWB was] added as an additional insured," the plain language of the other insurance clause provided that it was excess to the other carriers' policies. The trial court thus correctly applied the other insurance clause to deem the StarNet policy excess to those of Colony and First Specialty, because to do so conformed to the policy language and did not conflict with the interests of the insured or public policy. (*Hartford Casualty Ins. Co. v. Travelers Indemnity Co.*, *supra*, 110 Cal.App.4th at p. 726 [applying other insurance clause to a situation where the policies did not conflict and provided one policy would become "excess in the situation where the parties and the insurers are most likely to intend that result — when the insured is covered as an additional insured on another party's policy for some specific event or situation"].)[12]

---

12 Colony asserts that the trial court erred in determining that the policies issued by it and First State were "primary coverage" for EWB's liability because (1) EWB's liability represented a different "risk" that they did not insure; and (2) there was "an undetermined portion of EWB's liability which was covered directly by the StarNet policy, which also was not subject to . . . the other insurance provisions of the policy." However, as we have explained, the Colony policy covered the entirety of the Ortega settlement (i.e., the "loss," as used in the other insurance clauses) and the trial court properly applied the language of the other insurance clauses to that loss. Colony provides no authority or any basis in the language of the other insurance clauses for its proposition that part of the loss was exempted from the other insurance clauses.

We reject Colony's argument that the only equitable allocation would have been to assign each insurance carrier one-third of the cost of the Ortega settlement. The trial court reasonably determined that the StarNet policy was excess based on the plain language of the policies. Given that StarNet's policy provided only excess coverage and that the Ortega settlement did not exhaust the primary coverage (i.e., the combined $2 million limit of the Colony and First Specialty policies), the StarNet policy coverage was never reached. Colony has not shown that the trial court's ruling "exceeded the bounds of reason" by not allocating any portion of the Ortega settlement to the StarNet policy. (*Shamblin*, *supra*, 44 Cal.3d at p. 478.)

In sum, we conclude the trial court did not abuse its discretion in determining it would enforce the StarNet policy's other insurance clause as written and in allocating half of the settlement to the Colony policy.

D. *The Trial Court Did Not Err in Denying Colony an Offset*

Colony next contends that the trial court erred in not permitting an offset for the payment made to First Specialty and StarNet on behalf of Mechanical under Code of Civil Procedure section 998.[13] We reject Colony's contention.

The purpose of allowing an offset is to ensure against double recovery of damages. In *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158-1159 (*Tavaglione*), the California

---

13 First Specialty and StarNet accepted Mechanical's section 998 offer under which Mechanical made a total payment of $151,000 in resolution of all claims against it. Of that amount, $122,144.85 represented a payment towards "indemnity," as the parties stipulated.

Supreme Court explained: "Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. [Citation.] [¶] . . . [¶] In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories."

The damages sought by First Specialty and StarNet from Mechanical and EWB was "a set sum, . . . $1,050,000 paid in settlement of the Underlying Action and $57,710.30 in defense fees and costs." The trial court award consisted only of the first item of those damages, namely, the Ortega settlement payment,[14] and the judgment awarded half of the amount paid in the Ortega settlement, or $525,000, to First Specialty and StarNet. Mechanical's "indemnity" payment under its section 998 offer was $122,144.85. Therefore, through the section 998 offer payment and the judgment, First Specialty and StarNet recouped $647,144.85 of the total $1,050,000 in damages they sought. They therefore did not receive a double recovery of that "item" of damages. (*Tavaglione, supra*, 4 Cal.4th at pp. 1158-1159.)

---

14 At the time of trial, defense costs were no longer in issue.

Having determined that the denial of an offset did not result in a prohibited double recovery, we next consider Colony's contention that the trial court's failure to give it credit for the Mechanical settlement payment was inequitable and constituted an abuse of discretion. Specifically, Colony argues that without an offset it: (1) bore a disproportionately large share of the Ortega settlement when considered in light of the parties' respective liabilities, and (2) paid more than 50 percent of the settlement, contrary to the trial court's stated intention to divide the Ortega settlement equally.[15] We disagree, for three reasons.

First, there was no finding in the underlying action, or in the statement of decision, regarding the parties' relative degree of fault for Ortega's injuries. Second, the trial court never determined, as Colony implies, that Colony should pay 50 percent of the Ortega settlement. Rather, in addressing First Specialty and StarNet's equitable contribution claim, the trial court determined only that the Ortega settlement should be allocated between the two primary insurers according to their policy limits (as described in part II.C.2, *ante*). Third, the trial court properly considered the nature of the claims and contractual and insurance arrangements and stated it would not award an offset based on the separate nature of the claims that First Specialty and StarNet asserted against

---

15 Under its theory, Colony calculates that it paid 62 percent of the Ortega settlement, "far askew from what the trial court determined to be an equitable allocation of indemnity."

Mechanical and Colony.[16] (*St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1253 [in determining equities among insurers, court should consider nature of claim, relation of the insured to the insurers, the particulars of the policies "'"and any other equitable considerations"'"].) Even if we might have awarded Colony an offset for the Mechanical settlement were we presented with the issue in the first instance, on this record we cannot say that the trial court abused its discretion in not doing so.

Therefore, we reject Colony's contention that the trial court erred in not permitting it an offset for the amount First Specialty and StarNet received under Mechanical's section 998 offer.

E. *First Specialty and StarNet's Equitable Contribution Claim Is Not Barred by Their Acceptance of Mechanical's Section 998 Offer Because the Settlement Applied Only to Their Separate Subrogation Claim Against Mechanical*

Colony next contends that First Specialty and StarNet are barred from making a claim for equitable contribution because they settled their claims against Mechanical. Colony argues that First Specialty and StarNet's acceptance of the section 998 offer from Mechanical, which referred to a dismissal and release of "all claims," effectively extinguished any claim relating to Mechanical's work. We disagree.

---

16 The Mechanical settlement was based on First Specialty and StarNet's separate claim for equitable subrogation under the indemnity provision contained in Mechanical's subcontract with EWB. This claim was separate from the equitable contribution claim against Colony, as the trial court found.

"Compromise agreements are, of course, 'governed by the legal principles applicable to contracts generally.' . . . They 'regulate and settle only such matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequences thereof, and do not extend to matters which the parties never intended to include therein, although existing at the time.' . . . *They do not . . . (absent affirmative agreement of the parties), conclude matters incident to the judgment that were no part of the cause of the action.*" (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677 (*Folsom*), citations omitted, italics added.)

Mechanical's section 998 offer[17] stated:

> "Defendant, Mechanical Industries, hereby offers settlement in the amount of $151,000 in exchange for a dismissal with prejudice and a general release of all claims. This amount offered in settlement shall be the total amount that defendant shall be obligated to pay on account of any liability claim herein, and is inclusive of any lien of any kind. Each party agrees to bear their own costs, and by acceptance of this offer of settlement, the plaintiff expressly waives any claim for attorneys' fees or costs."

By its plain language, the offer extends only to "defendant" Mechanical (singular) — not to "defendants" — or to Colony. Colony fails to show, as it must, that in entering into the settlement, the parties intended to release Colony, as a separate party, from all claims. (*Folsom*, *supra*, 32 Cal.3d at p. 677; *McCall v. Four Star Music Co.*

---

17 Apart from First Specialty and StarNet's written acceptance of the offer, the record contains no settlement documents. "'A fundamental principle of appellate practice is that an appellant "'must affirmatively show error by an adequate record. . . .'"'" (*Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125.) It is the appellant's responsibility to prepare an adequate appellate record for review of the issues raised on appeal. (*Ibid*.)

(1996) 51 Cal.App.4th 1394, 1400 [settlement agreement releasing "'all parties except'" a nonsettling defendant from liability did not release nonsettling defendant (italics omitted)].) Moreover, Colony points to no language or circumstance evidencing any intent by the settling parties to release any claim against Colony under the additional insured coverage it provided to EWB, which was the basis for First Specialty and StarNet's equitable contribution claim.[18]

We therefore conclude that the release of Mechanical under its section 998 offer did not extinguish First Specialty and StarNet's equitable contribution claim against Colony.

We now turn to an examination of Colony's challenge to the trial court's award of prejudgment interest.

F. *Trial Court Did Not Abuse Its Discretion in Awarding Prejudgment Interest*

Colony challenges the trial court's award of prejudgment interest under Civil Code section 3287 on the grounds that the amount it was required to contribute to the Ortega settlement was unknown and subject to all of the contentions it has asserted in this appeal.

---

18 The authorities cited by Colony are inapposite. In *Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th 1668, 1691, the court held under principles of res judicata that dismissal of a previous action precluded a second action based on the same theory against the same defendants. In *Purcell v. Colonial Ins. Co.* (1971) 20 Cal.App.3d 807, 814, an insured was barred from pursuing his insurer for damages after assigning all rights in his policy to another party in exchange for a release. Neither of these cases bears any resemblance to the facts or agreements at issue in this case.

Civil Code section 3287, subdivision (a) provides for the payment of prejudgment interest to every person entitled to receive damages that are certain, or capable of being made certain by calculation, if the right to receive such damages vested on a particular day. "Under [Civil Code] section 3287, subdivision (a) the court has no discretion, but must award prejudgment interest upon request, from the first day there exists both a breach and a liquidated claim." (*North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 828.) Civil Code section 3287 does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, "'"depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor."'" (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 960.) The certainty addressed by Civil Code section 3287 is the certainty of the damages suffered by the plaintiff, not the certainty of a defendant's ultimate liability. "[A] defendant's denial of liability does not make damages uncertain for purposes of Civil Code section 3287." (*Wisper*, at p. 958; *Credit Managers' Assn. v. Brubaker* (1991) 233 Cal.App.3d 1587, 1595.)

As applied to an equitable contribution claim, the courts have held that a dispute over the relative positions of different insurers does not make damages so uncertain as to make prejudgment interest inappropriate. (*Fireman's Fund Ins. Co. v. Allstate Ins. Co*. (1991) 234 Cal.App.3d 1154, 1173 [awarding prejudgment interest where insurer contested the amount of its liability for contribution to settlement made by other insurers because the amount it owed was readily ascertainable and the only issue was whether it

was legally required to pay full amount]; *Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285, 1307 [awarding prejudgment interest where only question in suit for contribution by settling insurer against two nonsettling insurers was how the court would prioritize the policies].)

The trial court awarded prejudgment interest calculated from the date the Ortega settlement was paid through the date of judgment in this action. The award was appropriate because Colony had an obligation to contribute to the settlement no later than the date the settlement was paid, and the settlement amount — the damages for the purpose of the equitable contribution claim — was certain. Below, Colony contested that it had liability, not that the amount of damages sought by First Specialty and StarNet was too high or uncertain as to require adjudication.[19] This is not a situation in which "the amount of damage, as opposed to the determination of liability, 'depends upon a judicial determination based upon conflicting evidence and is not ascertainable.'" (*Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, *supra*, 234 Cal.App.3d at p. 1173, quoting *Esgro Central, Inc. v. General Ins. Co.* (1971) 20 Cal.App.3d 1054, 1062 [awarding prejudgment interest on fire loss where dispute was based on coverage, not amount of loss, which could be computed].)

---

19 Colony acknowledges in its opening brief that the amount of damages sought by First Specialty and StarNet was "a set sum."

We therefore conclude the trial court did not err in awarding prejudgment interest on the amount Colony was required to pay in equitable contribution under the judgment in this action.

DISPOSITION

The judgment is affirmed. First Specialty and StarNet are to recover costs on appeal.

IRION, J.

WE CONCUR:

MCDONALD, Acting P. J.

AARON, J.